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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 323

THE ASSINIBOINE INDIAN TRIBE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims is reported in 121 F. Supp. 906, and appears in the appendix to the petition, pp. 1-18. The opinions of the Indian Claims Commission, reported in 2 Ind. Cls. Comm. 272, are also in the appendix to the petition, pp. 33-58.

JURISDICTION

The judgment of the Court of Claims was entered on June 8, 1954. The petition for a writ of

certiorari was filed on September 1, 1954. The jurisdiction of this Court is invoked under section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s and 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether a previous decision and judgment of the Court of Claims fixing the liability of the United States for the taking of petitioner's lands is *res judicata* of a claim for additional compensation (the value of the lands plus interest from the date of taking) filed under the Indian Claims Commission Act.

2. Whether a legal claim which has previously been finally adjudicated can be re-litigated under section 2, clause 5 of the Indian Claims Commission Act providing for claims based on "fair and honorable" dealings.

STATUTE INVOLVED

The Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70, and the Jurisdictional Act of March 2, 1927, 44 Stat. 1263, are set out in the appendix to the petition, pp. 21-32, 19-21.

STATEMENT

By the Act of March 2, 1927, 44 Stat. 1263, Congress conferred jurisdiction on the Court of Claims to "adjudicate and render judgment in any and all claims arising under or growing out of the Treaty of Fort Laramie of September 17, 1851 * * * between the Government of the United

States and the Assiniboine Indian Nation * * *." Section 4 of the Act provided that in cases where the taking was unlawful the damages awarded should be confined to "the value of the money or other property at the time of such appropriation or disposal."

Pursuant to that Act petitioner in 1930 filed suit in the Court of Claims to recover "damages" for the appropriation of certain land alleged by petitioner to have been owned by it by "immemorial possession" and also to have been granted to it by the Treaty of Fort Laramie dated September 17, 1851, 11 Stat. 749. *Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347. As noted by the court below (Pet. App. 5), petitioner in that suit contended its lands had been *wrongfully* appropriated. Interest from the date of taking as an element of compensation was not asked for. The Court of Claims found that petitioner had failed to prove title by immemorial possession (77 C. Cls. at p. 368), but did find and hold that 6,477,940 acres "were expressly granted to the plaintiff tribe [petitioner] by the treaty made with the plaintiff on September 17, 1851". Fdg. VIII, 77 C. Cls. 356, 370-371. The court, after stating that "the lands granted the plaintiff tribe by the Treaty of Fort Laramie were taken over by the Government", stated: "We conclude that the value of this land at the time it was taken did not exceed 50 cents an acre and may have been less, and that its total value did not exceed $3,238,970." 77 C. Cls. 371, 373. Since as the

court below noted in its opinion in the instant case (Pet. App. 2) allowable offsets for expenditures by the Government exceeded this amount, "this judgment in favor of the tribe was satisfied by the judgment against the tribe for the offsets and final judgment was entered dismissing the petition." This Court denied certiorari, 292 U. S. 606.

In November, 1950, seventeen years after the judgment of the Court of Claims in the first case, petitioner instituted the present action to recover for the same taking of the same lands. This time, however, petitioner's case was pitched on the theory that the taking of its lands was lawful because ratified by Congress and that petitioner is entitled to just compensation under the Fifth Amendment. Petitioner sought judgment for $11,681,355 as the value of the land as of the date of taking, plus an increment for delay in payment "measured by a reasonable rate of interest [on the $11,681,355, of course] from the time of taking to the date of payment" (Am. Compl. pars. IX, XI, and XII).[1]

The United States filed a motion for summary judgment on the ground that the decision and judgment in the prior case is *res judicata* of the claim now advanced. The Indian Claims Commission granted the motion and, on appeal, the Court of Claims affirmed, one judge dissenting.

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[1] Since the latest of the takings claimed was in 1880 (Am. Compl., par. X), it is apparent that interest on eleven and one-half million dollars over a period of seventy-five years brings petitioner's claim to a staggering total regardless of what is considered a "reasonable" rate of interest.

ARGUMENT

1. The provision of the Indian Claims Commission Act (Section 2, Pet. App. 22) waiving the statute of limitations and laches but providing that "all other defenses shall be available to the United States" makes it clear that the defense of *res judicata* was fully preserved. Petitioner, attempting to establish the contrary, relies (Pet. 22) on the statement of the House Managers on the conference report on the bill as enacted.

Since the statute is clear and unambiguous, only the most compelling legislative history could warrant a contrary reading. Cf. *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89. However, as it had previously done in *Blackfeet and Gros Ventre Tribes of Indians* v. *United States*, 119 F. Supp. 161, the court below demonstrates conclusively (Pet. App. 14-15) that the legislative history of the Act shows, as the Act itself provides, a clear intent to preserve without qualification the defense of *res judicata*. That history, as set out by the court below, is summarized at pp. 6-7 of the Government's brief in opposition to the petition for certiorari in the *Blackfeet* case, No. 255, October Term, 1954.

The fallacy underlying this petition is in saying that the taking of petitioner's lands gave rise to more than one cause of action. But as the court below correctly observed (Pet. App. 4) "the appropriation of appellant's land by the United States gave rise to but one cause of action in appellant for the deprivation or taking of the same land." Since there is a single, complete, and final appropriation of appellant's land, there is a single cause of action.

Baltimore Steamship Co. v. *Phillips,* 274 U. S. 316, 321. That a specific taking may or may not be unlawful, in the sense of being unauthorized by Congress, does not alter this fact. For a like reason, as the court below points out (Pet. App. 10; and see Pet. App. 42, 57), the value of the land and interest for delay in payment do not give rise to two causes of action but together constitute just compensation for a single taking.

Petitioner of course agrees that the 1927 jurisdictional act gave jurisdiction to the court below to adjudicate claims for a wrongful taking, since it contends that the 1927 Act was confined to such claims (Pet. 8-15). So in the earlier case, when petitioner elected to rest its case on an unlawful taking, the decision and judgment that there had been such a taking and fixing the liability accordingly was clearly within the jurisdiction of the court below. Hence the judgment in the prior case is clearly a bar to a second action based on a new theory that the taking was lawful, for section 4 of the 1927 Act itself (Pet. App. 20) expressly provided that the decree of the court below shall be in full settlement of all damages for such wrongful taking. Cf. *United States* v. *Oregon Lumber Co.,* 260 U. S. 290, 295.[2]

Moreover, as the court below points out (Pet. App. 10), the former judgment is a bar to future

[2] It was on this basis that Commissioner Witt in his concurring opinion (Pet. App. 57-58) appraised the matter, and therefore he did not reach the question of whether under the 1927 Act petitioner could have sued for a taking by eminent domain.

litigation, not only as to matters expressly litigated, but also as to issues which could have been presented. And it is clear that petitioner could, under the 1927 Act, have presented the claim it now seeks to litigate, that is, that the taking was by eminent domain and that it was entitled to the value of the land plus interest thereon for delay in payment.

Section 1 of the 1927 Act, with respect to the Fort Laramie treaty lands, empowered the court to adjudicate and render judgment in "*any and all* claims arising under or growing out of the Treaty of Fort Laramie," and the committees of both the Senate and House in reporting the bill stated that it "is drafted in broad language *to permit of a final adjudication of all the claims of the Assiniboine Indians.*" (Pet. App. 19, 6; italics supplied). It is immaterial that no specific provision for interest was included, *Shoshone Tribe of Indians* v. *United States,* 299 U.S. 476, 497. Section 4 of the Act, barring interest, relates only to wrongful takings. As the court below points out (Pet. App. 8), that section has nothing to do with the type of claims that could be litigated under section 1 and does not in any way limit the broad coverage of that section.[3]

[3] Petitioner's argument (Pet. 9-10) that the amendment of section 1 by the House narrowed its scope is groundless. The House amendment was made at the request of the Secretary of the Interior, who gave no indication that the House and Senate versions were in any legal sense different, and they are not. Thus, even after amendment, the House Committee, as had the Senate Committee, stated that "This bill is drafted in broad language to permit of a final adjudication of all the claims of the Assiniboine Indians." H. Rept. 952, 69th Cong., 1st sess., p. 2.

Thus an identical provision in another act did not preclude an award for a taking by eminent domain. *United States* v. *Klamath Indians,* 304 U.S. 119.

Many years before the entry of judgment in the prior case, this Court had established that, as to lands held under treaty, Indian tribes enjoy the protection of the Fifth Amendment. *Yankton Sioux Tribe* v. *United States,* 272 U.S. 351, 359, in which it was held that where the Government had taken lands of the Tribe "they are entitled to just compensation under the power of eminent domain." And the Court of Claims, on remand of that case, made an award for the value of the lands, plus interest from the date of taking. 65 C. Cls. 427, 429. And, as the Court of Claims points out (Pet. App. 12), the subsequent decisions of this Court have always sustained that proposition.[4]

It is thus clear that under the 1927 Act the court below had jurisdiction to entertain a claim under the Fifth Amendment. Hence, since petitioner could have litigated the present demand in that

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[4] Petitioner (Pet. 16) seeks to differentiate its case by asserting that it had Indian title, i.e., title by immemorial possession. But that was expressly decided against it in the earlier suit, and it was expressly adjudged that its title sprang from the Ft. Laramie treaty (*supra,* p. 3). Petitioner evidently does not realize that if its interest in the lands was merely Indian title, its present suit would fail, irrespective of *res judicata,* because the taking of such title is not a taking under the Fifth Amendment, and hence the real objective of the present suit, interest from date of taking, would not be recoverable. *United States* v. *Tillamooks,* 341 U. S. 48.

proceeding, the earlier judgment renders the present claim *res judicata.*[5]

2. Petitioner (Pet. 25-26) for the first time in this case seeks to rely on clause 5 of section 2 of the Indian Claims Commission Act, providing for claims based on "fair and honorable dealings." The Court of Claims and the Indian Claims Commission, of course, do not discuss this contention since it was not raised below. But they flatly rejected the proposition that the defense of *res judicata* could thus be circumvented in *The Blackfeet and Gros Ventre Tribe of Indians, etc.* v. *United States,* No. 255, October Term, 1954.

Petitioner's brief reference to clause 5 ignores the other clauses of section 2. In that section (Pet. App. 22), Congress listed four classes of cases in which it consented that the United States might be sued. All four are categories where the claims of the Indians are based on grounds well recognized in law or equity as the basis of judicial relief, and peti-

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[5] Petitioner's reliance (Pet. 16-18) on the "intervening decision" doctrine is of course baseless. As the court below points out (Pet. App. 11-12) the doctrine is limited to situations where a second and independent cause of action arises after the intervening decision. Moreover, there is no intervening decision here. *Shoshone Tribe* v. *United States,* 299 U. S. 476, did not, as petitioner states (Pet. 17), involve Indian title, but a title arising under a treaty, as does petitioner's. Thus that case is simply one of a uniform series of cases holding such title compensable, does not present any change in the decisions, and plainly shows that petitioner could have presented its present claim in the earlier suit.

tioner's claim is embraced in clauses 1 and 4.[6] Congress then added a fifth category—"claims based upon fair and honorable dealings *that are not recognized by any existing rule of law or equity*" (emphasis added). Clearly, the aim of clause 5 of section 2 was to provide for a new class of cases hitherto unknown to law or equity, and of course distinct from the classes of cases listed in clauses 1 through 4.[7]

If clause 5 meant, as petitioner contends, that cases falling into the first four classes, i.e., claims recognized by law or equity, could be litigated on

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[6] "* * * (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; * * * (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; * * *."

[7] The House Committee on Indian Affairs, reporting the bill creating the Indian Claims Commission (H. Rep. No. 1466, 79th Cong., 1st sess., p. 12), explained the "fair and honorable dealings" clause by referring to past instances in which claims "not strictly legal, but meritorious in character have developed, which the Congress has recognized in a few special jurisdictional acts." The example cited was the Tlingit and Haida Claims Act of 1935, 49 Stat. 388, which detailed particular instances in which the Indians may have been deprived of interests, neither legal nor equitable in origin, for which they should, in justice, be paid. The Congress undoubtedly also had in mind the cases in which the court below and this Court had denied relief, under special jurisdictional acts, because the Indian claim was not legal or equitable, but only moral. See e.g., *Blackfeather* v. *United States*, 190 U. S. 368, 373; *Sac and Fox Indians* v. *United States*, 220 U. S. 481, 489; *Sioux Tribe* v. *United States*, 97 C. Cls. 613, 670; cf. *Sioux Tribe* v. *United States*, 316 U. S. 317, 331.

the basis of "fair and honorable dealings," then the first four clauses of section 2 would be surplusage because all claims previously adjudicated could be phrased in the language of clause 5. But, as the court below stated in *Western Cherokee Indians, et al.* v. *United States,* 116 C. Cls. 665, 677-678, certiorari denied, 340 U.S. 904, "Clause (5) obviously has reference to the fundamental character of the claim rather than to the theory on which an Indian tribe or band may seek to invoke the jurisdiction of the Indian Claims Commission." And unquestionably the fundamental character of the claim of petitioners in the present suit is a legal claim under the Fifth Amendment falling expressly under clauses 1 and 4 of section 2. Petitioner's argument on this point is merely an indirect attempt to defeat the defense of *res judicata* which, as we have shown, was preserved to the United States.

CONCLUSION

The questions were correctly decided below and do not call for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1954.

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